



FALQs

FREQUENTLY ASKED LEGAL QUESTIONS

PART I/IV

Public Procurement and Asset Disposal in Kenya

1. What is public procurement?

- Under Section 2 of the Public Procurement and Asset Disposal Act, 2015 (hereinafter referred to as “the PPADA” or “the Act”), “public procurement” means procurement by procuring entities using public funds. In the same section, “procurement” is defined to mean acquisition by purchase, rental, lease, hire purchase, license, tenancy, franchise, or by any other contractual means of any type of works, assets, services or goods including livestock or any combination and includes advisory, planning and processing in the supply chain system using public funds.
- Public procurement can be defined simply as the purchase of goods and services by a government agency (public entities) from the private sector using public funds to enable the agency to perform its basic public functions and provide services to the common mwananchi i.e. members of the public.
- Some examples include; the procurement for provision of works by the Kenya Urban Roads Authority (KURA) for the construction of a road; the procurement of goods for the supply of desks to one of the local public schools by a County Government or the procurement of legal or valuation services by a Parastatal.

2. Who must buy through public procurement?

- All public entities must buy through public procurement. Section 2 of the PPADA defines public entities to include;
 - a) the national government or any organ or department of the national government;
 - b) a county government or any organ or department of the same;
 - c) the Judiciary and the courts;

- d) the Commissions established under the Constitution;
- e) the Independent Offices established under the Constitution;
- f) a state corporation within the meaning of the State Corporations Act;
- g) the Central Bank of Kenya established under the Constitution;
- h) a public school within the meaning of the Basic Education Act, 2013;
- i) a public university within the meaning of the Universities Act, 2012;
- j) A city or urban area established under the Urban Areas and Cities Act, 2011;
- k) a company owned by a public entity;
- l) a county service delivery coordination unit under the National Government Co-ordination Act, 2013;
- m) a constituency established under the Constitution;
- n) a Kenyan diplomatic mission under the state department responsible for foreign affairs;
- o) a pension fund for a public entity;
- p) a body that uses public assets in any form of contractual undertaking including public private partnership;
- q) a body in which the national or county government has controlling interest;
- r) a college or other educational institution maintained or assisted out of public funds;
- s) an entity prescribed as a public entity for the purpose of this paragraph; or
- t) any other entity or a prescribed class of public entities or particular public entities that uses public money for purposes of procurement or any other entity as declared under sections 4 and 5 of the Public Finance Management Act, 2012.

3. What activities may seem to qualify as public procurement but actually are not?

According to Section 4 of the PPADA, the following activities which may easily be confused for public procurement are not procurements or asset disposals with respect to which the Act applies. They are:

- Retaining of the services of an individual as an employee for a limited time. This does not apply to a contract of service which may be procured;
- Transfer of assets being disposed off by one state organ or public entity to another state organ or public entity without payment of money;
- Acquiring of services by a public entity which are provided by the government or government departments;
- Acquisition and sale of shares or securities by a public entity, investments such as shares purchased by cooperative societies, state corporations or other public entities;
- Procurement and disposal of assets under the Public Private Partnership Act, 2013
- Procurement and disposal of assets under bilateral or multilateral agreements between the Government of Kenya and any other foreign government, agency, entity or multilateral agency unless the Regulations prescribe otherwise.

4. What is the main legislative framework governing public procurement in Kenya?

- The Constitution of Kenya, 2010
- The Public Procurement and Asset Disposal Act, 2015 (PPADA)
- The Public Procurement and Asset Disposal Regulations, 2020 (PPADR)
- The Public Finance Management Act, 2012
- Ethics and Anti-Corruption Commission Act, 2011
- Leadership and Integrity Act, 2012

5. Which government entities or bodies are involved in the regulation and oversight of Public Procurement in Kenya?

- The National Treasury and the equivalent at County level
- The Public Procurement Regulatory Authority (PPRA)
- The Public Procurement Administrative Review Board (PPARB)
- The Courts

6. What is the difference between PPRA and PPARB?

- The Public Procurement Regulatory Authority (PPRA) is the watchdog regulatory authority of everything public procurement and asset disposal in Kenya. It is established under Section 8 of the PPADA and its functions set out under Section 9 of the PPADA. It oversees the procurement sector to ensure that its running in accordance with the national values and principles under the Constitution and the Act. It has an investigative mandate to investigate any complaints from public entities, contractors or the general public on any suspicious activities surrounding public procurement proceedings and to carry out debarment proceedings.
- The Public Procurement Administrative Review Board (PPARB) on the other hand is a Tribunal that hears complaints from aggrieved candidates or tenderers with regard to a particular procurement or asset disposal process where the candidate or tenderer thinks that its rights may have been infringed by a public entity during a procurement process. Its establishment, functions and powers and composition are detailed in Sections 27 to 32 of the PPADA.

7. What is the role of the PPRA?

The functions of the PPRA are set out in detail in Section 9 of the PPADA and are as summarised below:

- Enforce any standards set out under the PPADA and ensure that public entities carry out public procurement and asset disposal in an open, transparent and competitive way;
- Monitor the implementation of the preference and reservation schemes by public entities to ensure that the disadvantaged groups get access to public procurement opportunities as advertised by public entities;
- Provide advice and technical support upon request;
- Investigate and act on complaints received on procurement and asset disposal proceedings from public entities, tenderers, contractors or the general public that are not within the scope of the PPARB;
- Develop and manage the state portal on procurement and asset disposal and ensure that it is available and easily accessible. Here, anyone can track procurement contracts or the list of qualified suppliers and other information as pertains public procurement;
- Create a database that includes; complaints made on public entities, a record of debarred contractors, market prices of goods and services, benchmarked prices, state organs that are non-compliant with procurement laws, statistics related to public procurement, price comparisons for goods and any information related to public procurement that may be necessary for the public;
- Inform the Cabinet Secretary, Parliament, relevant County Executive Members for finance or Auditor General of incidences of non-compliance or material breaches with procurement once a state organ or public entity ignores written directives of the PPRA;
- Perform other functions as provided for under the Act and any relevant law.

8. What is PPOA?

- The Public Procurement Oversight Authority (PPOA) is the previous regulatory authority established under the Public Procurement and Disposal Act, 2005. Since the passing of the PPADA, 2015, PPOA was abolished and in its place is the PPRA.

9. How do I tell if I have been awarded a tender?

- Contrary to popular belief, tenders are not awarded to the lowest priced bids but rather, to bidders who submitted the lowest evaluated responsive bid which has passed the preliminary evaluation, technical evaluation, the financial evaluation stage and been adjudged to also be the lowest in terms of price and finally passed the post-qualification (due-diligence) stage. (Section 83 and 86 of PPADA)
- Depending on the procurement method that is used, the successful bidder may be the one that has the highest combined technical and financial score.
- A bidder is usually notified that it has been awarded a tender through a letter of notification of award. Take note that the award may be challenged by other bidders within fourteen days from the date that the unsuccessful bidder was notified of the outcome of evaluation.

10. Who should be notified of the results of the tender evaluation?

- Both the successful and unsuccessful bidders should be notified of the results of the tender evaluation.
- For the letters to the unsuccessful bidders, the same should contain reasons why their tender was unsuccessful and the name of the bidder who was successful as well as the price at which the tender was awarded to the successful bidder.
- Section 86 (3) of the PPADA not only makes it mandatory for the public entity to send out the letters to the successful bidder and the unsuccessful bidders but that the letters should be sent out simultaneously and not at different times or dates.

11. What is tender security?

- Section 2 of the PPADA defines tender security as a guarantee required from tenderers by the public entity and provided to the public entity to secure the fulfillment of any obligation in the tender process. It is also known as Bid Bond.
- It is often in the form of financial arrangements such as bank or insurance guarantees, security bonds, standby letters of credit, cash deposits and promissory notes etc.

12. What are the exceptions to tender security?

- Tender security is not required in procurements reserved for small and micro-enterprises or enterprises owned by women, youth, persons with disabilities and other disadvantaged groups. Instead, this target group may be required to fill in a Tender Securing Declaration Form as prescribed in the PPADR (Section 61 (5) of the PPADA and Regulation 46, 155 and the Fourth Schedule of the PPADR).

13. What is performance security?

- Not to be confused with tender security, performance security is only submitted by the successful bidder and in case the contract is not performed or is not fully or well executed, the public entity shall fully seize this security as compensation. It is meant to protect government/

public entities from situations of failed or poor performance and is usually equivalent to not more than ten percent of the contractual sum upon which the tender was awarded (Section 142 of the PPADA)

- For procurements within the thresholds reserved for small and micro-enterprises or enterprises owned by women, youth, persons with disabilities and other disadvantaged groups, the performance security may be waived or fixed at not more than one percent of the contract price.

14. What advantages does the law afford me as a woman, youth or person with disability in procurement?

- These individuals are eligible to the application of preference and reservation schemes.
- Preference is defined in Section 2 of the PPADA as the right or opportunity to select a tenderer from an identified target group that is considered more desirable than another. This would be for example in a tender which has specified preference to women, youth or persons with disabilities, these individuals' companies will have a certain percentage of their price reduced in order to make it cheaper and thus give them an advantage over other bidders.
- Reservations on the other hand means exclusive preference to procure goods, works and services set aside to a defined target group of tenderers within a specified threshold or region. This would for example be seen where a certain public entity reserves a particular tender only for women, youth or persons with disability and no other bidders other than those under these categories can bid for the tender.
- The Act (Section 157 (10) of the PPADA) makes it mandatory for public entities to ensure at least 30% of its procurement value in every financial year is allocated to the youth, women and persons with disability.
- As a person falling within any of these categories, you would benefit highly by paying attention to advertisements which are subject to preference and reservation schemes as this would improve your chances of winning.

15. Which categories of persons are eligible for preference measures in public procurement?

- Disadvantaged groups being youth, women and persons with disability
- Micro, small and medium enterprises
- Local contractors

16. How is the Government of Kenya implementing the preference measures in public procurement?

- As a way of implementing the preference scheme required by the Constitution and the PPADA, the Government of Kenya set up the Access to Government Procurement Opportunities (AGPO) program which can be accessed through the AGPO website (<https://agpo.go.ke>)
- The AGPO website describes the function of AGPO as follows:

“The aim of the AGPO Program is to facilitate the enterprises owned by youth, women and persons with disability to be able to participate in government procurement. This will be made possible through the implementation of the Legal requirement that 30% of government procurement opportunities be set aside for the youth, women and persons with disability. It is an affirmative action program aimed at empowering disadvantaged groups by giving them more opportunities to do business with Government.”

- The website requires registration of the enterprises owned by the youth, women and persons with disability to be registered on the website where the requirements are provided.

17. What are the procurement methods in Kenya?

The procurement methods are listed under Part VIII and IX of the PPADA.

- Open tender. This is the most common and preferred method.
- Request for proposals
- Two stage tendering
- Design competition
- Restricted tendering
- Direct procurement
- Request for quotations
- Low-value procurement
- Force account
- Electronic reverse auction
- Competitive Negotiations
- Specially Permitted Procurement - this procedure may only be used where the public entity has proven that the other procurement methods may not suit its needs and that the same is not being used to avoid competition of bidders or to procure items or services at a more expensive rate. (Section 114A of PPADA and 107 of the PPADR)
- Community Participation Method - listed under Regulation 108 of the PPADA Regulations 2020, pursuant to Section 92 (m) of the Act which provides for any other procurement method and procedure as prescribed in the regulations and described in the tender documents.

18. What are the evaluation stages in open tender method?

- **Preliminary evaluation stage:**
This is where the public entity evaluates whether the bidders have been responsive to the mandatory preliminary requirements under the tender document; for instance, provision of tender security, tax compliance, accreditation certificates and other necessary documents. Failure to meet mandatory requirements results to disqualification at this early stage and bars the bidder from proceeding further.
- **Technical evaluation stage:**
Here, the public entity analyses the ability of the bidder to perform the desired job and whether they have met the technical requirements or specifications. This stage is often characterized with a scoring method to tally the marks of the different bidders and a pass mark which the bidders ought to score in order to make it to the next stage. However, it is not unusual to find mandatory technical requirements which if not met will result to the disqualification of the bidder, regardless of their scores.
- **Financial evaluation stage:**
Only when the bidders have been through the preliminary and passed the technical evaluation stage is the price of their tenders considered. Having already analyzed the ability of the bidder to complete the works, the public entity now analyses the lowest price quoted in a bid to achieve the maximum value for minimum amount of money. Depending on the procurement method and the provisions of the tender document, evaluation at this stage may involve use of a formula that combines both the financial and technical scores to arrive at the lowest evaluated bidder.

- **Due diligence:**

Section 83 of the PPADA provides that the public entity may conduct due diligence involving the confirmation of references or the visit of the tenderer's offices. Although it is not couched in mandatory terms, the courts have held that due diligence is part and parcel of the evaluation process.

Due diligence is only conducted on the lowest evaluated tenderer.

19. How long should a public entity take to evaluate a tender?

- This often depends on the choice of procurement method employed by the public entity. However, for the two most common ones, open tender and request for proposals, evaluation of tenders should be carried out within a maximum of thirty days and twenty-one days respectively (Sections 80 (6) and 126 (3) of the PPADA).

20. Who can seek administrative review at the PPARB?

- Under the Section 167 of the PPADA, a candidate or tenderer can seek administrative review at the PPARB where he or she believes that a right owed to him or her by the public entity or a duty owed by a procuring entity under the law has been breached.

21. Who is a candidate?

- Under Section 2 of the PPADA, a candidate means a person who has obtained tender documents from a public entity pursuant to an invitation notice by a public entity.
- Where a tender document requires bidders to take certain steps before or after obtaining a tender document e.g. pay a certain amount of money or send an email confirming acquisition of a soft or hard copy of the tender document, a candidate should comply with these steps in order to qualify as a candidate.

22. Who is a tenderer?

- A tenderer means a person who submitted a tender pursuant to an invitation by a public entity (Section 2, PPADA).

23. What are my basic rights as a bidder?

- The right to apply for any advertised tender with no discrimination except for tenders which have been reserved for a particular group of persons. (Articles 10 and 227 (1) of the Constitution of Kenya, 2010)
- The right to be notified of the outcome of the tender evaluation whether successful or unsuccessful. This notification should contain the reasons why you were unsuccessful (for unsuccessful bidders) and inform you of the successful bidder and the price at which the successful bidder was awarded the tender. (Section 87 of the PPADA)
- Right to have your bid evaluated in accordance with the criteria and procedures under the tender document and the provisions of the PPADA. The public entity should not use any other criteria for evaluating your bid aside from the one that was contained in the tender document. (Section 80 (2) of the PPADA)
- The right to seek clarifications on anything that may not be clear under the tender document and to receive a prompt response from the public entity. (Section 81 of the PPADA)

- For persons who are eligible for the application of preference and reservation, the right to have these schemes applied to them as per the tender document (Section 157 of the PPADA)
- The right to have a refund of your tender security upon the completion of the procurement proceedings. (Section 61 of the PPADA)
- The right to receive any written communication from the public entity regarding the procurement which you participated in. This might be communication of the termination of the tender or the award of tender. Any addendums issued by the public entity too ought to be availed to each and every bidder.
- Freedom from discrimination and oppression based on gender, race, color or ethnicity with regards to any decision made by the public entity (Article 27 of the Constitution)
- The right to lodge a request for review, within fourteen days, at the PPARB claiming that any of the above rights have been infringed by the public entity and the right to appeal the decision of the PPARB to the High Court if aggrieved. (Section 167 and 175 of the PPADA)
- If declared the successful bidder and issued with a notification of award, absent any court proceedings or investigations by the relevant investigative authorities, the public entity should enter into a contract with you within the timelines provided under Section 135 of the PPADA. In the absence of this, you have a right to be informed of the reasons for failure to enter in contract.
- In conclusion, a bidder is entitled to any right provided in the Constitution of Kenya, 2010 that would be applicable in procurement proceedings, such as the right to fair administrative action as espoused under Article 47 of the Constitution.

24. What are the filing fees payable to the PPRA/PPARB for filing a request for review at the PPARB?

- The filing fees payable is provided in Fifteenth Schedule of the PPADR 2020 and as assessed by the PPARB. It is recommended that you request the PPARB Secretariat to confirm the applicable filing fees as the amount varies depending on the value of the tender. The PPARB Secretariat will also provide the bank account details where the filing fees should be deposited before filing of the request for review.

25. Is a bidder required to deposit the refundable deposit provided for under Section 167 (2) of the PPADA and Regulation 204 of the PPADR 2020?

- The deposit provisions were suspended by a Court Order dated 27th July 2020 issued in Petition No. E226 of 2020, Roads and Civil Engineering Contractors Association & Another v. Attorney General & 3 Others.
- The above case challenged the constitutionality of the deposit requirement before the filing of procurement cases on the basis that it was a violation of various provisions of the Constitution such as Article 48 on access to justice, amongst other provisions.
- On 27th July 2020, Hon. Mr. Justice W. Korir gave the following orders:
 - 1) THAT a Conservatory Order is issued staying the implementation and/or operation of any Regulation of the Public Procurement and Asset Disposal Regulation 2020, requiring the deposit of 15% of the Applicant's tender sum or 3% of the Applicant's tender sum before the commencement of Judicial Review Proceedings in respect of the Public Procurement.
 - 2) THAT all other provisions of the Public Procurement and Asset Disposal Regulation 2020 shall remain in force.
- The conservatory orders are still in force at the time of posting these FALQs in late March 2021. This section will be updated should the situation change.

26. What are the timelines for filing a request for review at the PPARB?

- Fourteen days either from the date of notification of award or if no award has been made, fourteen days from the date when the candidate or tenderer knew of the occurrence of alleged breach at any stage of the procurement process. (Section 167 (1), PPADA)
- The decisions of the PPARB and the Courts have made it clear that the date of notification of award means the actual date when the bidders receive the communication from the procuring entity and not the date on the letter or date when the letters were dispatched. This is aimed at addressing the mischief of deliberate delay of communication to unsuccessful bidders for purposes of defeating litigation.

27. How long does it take to have my request for review decided?

- Section 171 of the PPADA obligates the PPARB to hear and determine request for review applications within 21 days after the date when the same was filed.
- In practice, the PPARB strictly adheres to the 21 days' timeline and litigants before them also have to comply with the short time frames for filing pleadings and submissions. Any documents filed after the Ruling has been issued are not considered.

28. What other forums of dispute resolution are available to persons who feel aggrieved by a procurement process?

- The High Court. If dissatisfied with the decision of the PPARB, one can apply for judicial review of the Review Board's decision within fourteen days from the decision of the Review Board. (Section 175, PPADA)
- This however, does not mean that one must always approach the PPARB first. In rare cases, where the circumstances may not allow for one to approach the PPARB, then one can bypass it and go straight to the High Court.
- Judicial Review at the High Court may also be available to a contractor who has been debarred by the PPRA Board under Section 41 of the PPADA.
- For an aggrieved person who seeks to challenge other aspects of the procurement process besides the award of the tender or one who feels judicial review may be too limited in scope e.g. where facts are highly contested or where a litigant intends to challenge the merits of the case rather than just the decision-making process, they may file any other forms of cases before the High Court.
- The Public Procurement Regulatory Authority (PPRA) also has the mandate to investigate any complaints received on procurement and asset disposal proceedings that are not before the PPARB or subject to judicial review (Section 9 (h) PPADA)

29. What offences can a bidder be found guilty of?

The offences and sanctions are listed mainly in Part XVI of the PPADA and PPADR and include the following offences:

- Inappropriately seeking to influence the evaluation of tenders after the submission of tenders by making communications to the public entity or a member of the evaluation committee;
- Involvement in corrupt, coercive, obstructive, collusive, fraudulent practices or conflict of interest in a procurement process;
- Unduly influencing or exerting pressure on any member of the tender opening committee, or evaluation committee or any employee or agent of the public entity;

- Signing a procurement contract contrary to the requirements of the Act or Regulations;
- Contravening a lawful order of the PPRA or PPARB;
- Knowingly lie to or mislead a person carrying out a duty or function or exercising a power under the Act;
- Committing a fraudulent act;
- It is worth stating that a written inquiry on the status of a procurement process to the procurement entity after the timelines for evaluation have passed does not amount to inappropriately seeking to influence the evaluation process or exerting pressure on the tender opening or evaluation committees or employees or agents of the public entity, unless the wording of the communication is not simply an inquiry but is capable of being construed as an attempt to influence or exert pressure.

30. How can I tell that a public entity is committing a violation or offence in procurement?

A violation or offence can be said to have occurred if any of the following takes place:

- Any breach of confidentiality by an employee or agent of the public entity regarding information crucial to the procurement process thus hindering fair competition;
- It delays without justifiable cause the opening or evaluation of tenders or awarding of the contract beyond the prescribed period;
- Opening any sealed tender and any document required to be sealed or divulge their contents prior to the appointed time of tender opening;
- Splitting procurements contrary to the Act;
- Knowingly withholding the notification of tenders to successful or unsuccessful tenderer;
- Signing a contract with the successful tenderer before the lapsing of fourteen days after notification of award;
- Contravening of a lawful order given by PPRA or PPARB.

31. When can a public entity terminate procurement and asset disposal proceedings?

- As per Section 63 of the PPADA, the accounting officer of a public entity can terminate the procurement at any time prior to the notification of the award of the tender.

32. How can I tell if the tender I participated in was properly terminated?

Termination and cancellation of procurement and asset disposal proceedings is provided for under Section 63 of the PPADA. Termination or cancellation is only possible where any of the following applies:

- The procurement has been overtaken either by operation of the law or substantial technological change;
- Inadequate budgetary provision;
- No tender was received;
- Evidence that prices of the bids were above market prices;
- Material governance issues;
- All evaluated tenders were non-responsive;
- Force majeure;
- Civil commotion, hostilities or an act of war; or
- Upon receiving subsequent evidence of engagement in fraudulent or corrupt practices by the tenderer

33. What other requirements should the procuring entity satisfy for a termination to be legal?

- Upon satisfaction of any of the conditions highlighted in the previous paragraph, the accounting officer must notify anyone who participated in the procurement proceedings within fourteen days of termination.
- The accounting officer must also notify the PPRA of the termination through a report containing reasons for the termination. The fulfilment of the above conditions plus the notification of bidders and the Authority will make the termination proper.

34. Do the PPARB and the Courts have jurisdiction to entertain matters relating to termination?

- Even though Section 167 (4) of the Act provides that termination is one of the matters that should not be subject to review of procurement proceedings by the PPARB, the PPARB and Courts have held that the PPARB has jurisdiction in termination matters for purposes of determining if the statutory pre-conditions of Section 63 have been met by the procuring entity.
- This is in line with the principle that courts generally frown on laws that seek to oust the jurisdiction of courts and will therefore interpret those provisions narrowly.
- Therefore, if the PPARB determines that the statutory pre-conditions for termination have not been met, then it will rule that it has jurisdiction to entertain the matter and will proceed to hear it and issue a Ruling.

35. What is asset disposal?

- This is the conveyance of public assets owned by a public entity by any means including sale, rental, lease, franchise, auction or any combination of these to individual contractors or even other public agencies.

36. What are the various methods that may be used for asset disposal?

- Under Section 165 of the PPADA, a public entity may dispose assets by either of the following methods:
 - a) Transfer to another public entity or part of a public entity, with or without financial adjustment;
 - b) Sale by public tender;
 - c) Sale by public auction
 - d) Trade-in; or
 - e) Waste disposal management
- Regulation 181 (2) on methods of disposal provides that despite the provisions of Section 165 (1) of the Act, an accounting officer of a procuring entity may use additional methods of disposal as may be gazetted by the Cabinet Secretary from time to time.

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